No. 93-945

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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OFFICE OF THE CLERK

PETROCHEM INSULATION, INC.,
Petitioner,

v.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, DISTRICT COUNCIL 51 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, AND 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents respectfully request that the Court deny the Petition for Certiorari, which seeks review of an unpublished *per curiam* decision of the Ninth Circuit.

The Ninth Circuit affirmed dismissal of Petitioner's Sherman Act Section 1 claim for three independently sufficient reasons, none of which presents any novel or unsettled issue warranting certiorari. First, Petitioner alleged only unilateral conduct, and therefore failed to satisfy the fundamental requirement of showing joint action in order to state a claim for a "combination, contract or conspiracy" in restraint of trade. *See* Part I(A), *infra*. Second, Petitioner's claim of "sham petitioning" is squarely precluded by this Court's decision last term in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. --, 123 L. Ed. 2d 611 (1993), because Petitioner has pleaded no facts suggesting that Respondents' petitioning was "objectively baseless" as required to state a claim. *See* Part I(B), *infra*. Third, Petitioner failed to satisfy the requirement, common among the circuits, that a plaintiff must allege injury to competition in order to state a Section 1 claim in a rule of reason case. *See* Part I(C), *infra*. Each of these bases for dismissal is well supported by settled antitrust principles and raises no issue warranting review.

Likewise, the Petition's objection to dismissal of claims not preserved for appeal does not warrant certiorari. This argument merely objects to the Ninth Circuit's long-established and well-recognized procedures for preserving issues for review. *See* Part II, *infra*.

STATEMENT OF THE CASE

Petitioner filed this action with great fanfare and press coverage in December 1990, attempting to characterize the Defendants' union organizing and First Amendment-protected petitioning efforts as criminal conduct subject to the harsh remedies of the RICO and antitrust laws. SER 69

App. A.[1] Petitioner claimed that the unions had attempted to expand their members' job opportunities through allegedly 'sham' public participation before city councils or permit boards in permitting proceedings; that the unions had, by such petitioning, sought union-only contracts that allegedly violated Section 8(e) of the National Labor Relations Act ("NLRA"); and that the unions had, by allowing employers to transmit union members' dues to their unions under a "dues checkoff" procedure, allegedly violated the NLRA's proscriptions against illicit employer payoffs of unions. For each of these claims—some of which are no longer pressed in this Court—Petitioner eschewed the remedies that would have been available under the NLRA had any improper conduct actually occurred. Instead, Petitioner—and the anti-union organization which sponsored and funded this litigation[2]—sought to silence the unions and their attorneys by the *in terrorem* impact of RICO and antitrust claims, which threatened treble damages and massive costs of defense against an expansive, but seriously deficient Complaint. The problem with this approach, as recognized by the courts below, was the utter failure to plead facts constituting RICO or antitrust violations.

Petitioner is a non-union insulation subcontractor that claims it lost four opportunities to bid for construction projects as a result of Respondents' actual or threatened petitioning activity in opposition to permits for those projects. Second Amend. Cmplt. (Pet. App. E) ¶¶8, 54, 57, 67, 74. Petitioner's action sought over $3 million in damages, naming as Defendants some nineteen local plumbing and pipe-fitting unions (the "Locals"); a District Council of the Locals; Thomas J. Hunter, the business manager of the District Council; and one of the unions'

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[1]The Appendix to the petition for certiorari is referred to as "Pet. App." The appendix to this brief is referred to as "Resp. App." Excerpts and supplemental excerpts of the record in the Ninth Circuit are referred to as "ER" and "SER," respectively.

[2]Petitioner's litigation has been funded by the Associated Builders and Contractors' "Construction Legal Rights Foundation." SER 69, App. A.

attorneys—Thomas R. Adams, a well respected member of the bar specializing in environmental law—and his law firm. Pet. App. E ¶¶9-32. The initial complaint alleged that Respondents had conspired to commit criminal extortion and racketeering by threatening to appear at public hearings to oppose non-union construction projects. ER 169-70. The Respondents' participation in such proceedings was entirely appropriate in light of both the broad parameters of such agency decision making, and the legal standards for permit issuance, which consider the general public welfare. *See* note 9, *infra*. Nonetheless, Petitioner alleged that, for the four construction projects at which Petitioner would have bid for subcontracts, Defendants' "extorted" from project developers union-only project agreements which allegedly violated Section 8(e) of the National Labor Relations Act.

The District Court, the Honorable Eugene F. Lynch, dismissed the initial complaint without prejudice on April 30, 1991. Resp. App. A. Although Petitioner claimed that Respondents' opposition to projects were "sham," the District Court noted that Petitioner had provided no factual support for its "claims that the defendants threatened to make permit objections 'without regard to merit'" as to *any* of the four projects. *Id.* A-3 n.2. It chastised Petitioner for its deceptiveness in addressing the legal issues, noting that Petitioner had engaged in a "radical misreading [of the key authority] which vainly attempts to patch together a back-stop argument out of quotations taken out of context." *Id.* A-13 n.10. Following *Butchers' Union, Local 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986), the District Court held that the RICO extortion claims were preempted by the National Labor Relations Act. However, the court allowed Petitioner to file a motion for leave to amend, noting the possibility of an antitrust claim. ER 124 n.11.

On May 31, 1991, Petitioner filed such a motion, attaching a proposed First Amended Complaint attempting to assert antitrust claims based on the same four construction projects and alleging a new set of RICO claims based

on employers' transmittal of union members' dues to the defendant unions. SER 32. After a hearing, the District Court denied leave to file the proposed First Amended Complaint, finding it facially inadequate. Resp. App. B at B-2. At the hearing, the court expressed serious concern about the overbreadth and generality of Petitioner's pleading: "it's not detailed enough, it's not specific enough, and, frankly, your pleading has led to the expenditure of a lot of time and money." ER 82. It noted that there were "many, many ambiguities and/or omissions"; "you can say people conspired, but you've got to start naming names and tell us when, who was there, when did it happen, what date." ER 92.

Although the District Court granted Petitioner leave to file a Second Amended Complaint, it also entered a written order delineating precisely the elements required to plead an antitrust claim. Resp. App. B at B-2 to B-3. The court directed that, for any supposedly illegal union-only project agreement, Petitioner was to identify the parties to such an agreement by name and describe to the extent possible the agreement's terms. *Id.* ¶3(a)(i). For any other alleged conspiracy or combination between unions and non-union entities, Petitioner was to identify the parties by name and describe their common scheme. *Id.* ¶3(a)(ii). Petitioner was also directed to plead the injury to competition resulting from any alleged antitrust violation. *Id.* ¶3(c).

Petitioner's Second Amended Complaint (Pet. App. E) attempted to plead antitrust claims, one under Section 1 of the Sherman Act and one under Section 2.[3] Despite the District Court's detailed instructions on pleading the elements of antitrust claims, the Second Amended Complaint still failed to do so. The District Court, noting that it "had been enormously patient with the plaintiff, not

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[3]It also purported to assert the three RICO claims relating to employers' transmittal of union members' dues to the unions. No issue is raised in the Petition as to the Court of Appeals' affirmance of the District Court's dismissal of those claims.

only entertaining three attempts to [plead but also] providing guidance to plaintiff in that endeavor," dismissed each claim for relief for multiple reasons. Pet. App. B at 18a. In particular, it found that Plaintiff still "failed to allege that defendants have threatened or pursued *a single meritless objection to any construction project*, much less identify that objection or allege why such an objection should be considered meritless." Pet. App. B at 31a (emphasis added). Thus, despite the repeated and corrosive accusations of meritless or "sham" proceedings contained in Plaintiff's Petition, Judge Lynch found that the Second Amended Complaint in fact does not identify or describe even *one* "sham" proceeding in which Respondents participated.[4]

The Court of Appeals affirmed. With respect to the Section 2 claim, it held that (1) the complaint failed to allege that the defendants possessed monopoly power in the relevant market (the pipe and insulation subcontracting market in Northern and Central California); (2) the defendants assertedly unlawful activities were unilateral, and therefore could not achieve monopoly power by combination with some actual participant in the relevant market; and (3) for the same reasons no attempted monopolization

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[4]Although the Second Amended Complaint identifies numerous construction projects, it asserts that the unions took a losing position in opposition to only one, Allied Signal, where one aspect was allegedly "*continued* long after it was clear that Defendants' claims had no merit." Pet. App. E ¶48 (emphasis added). However, even the allegations as to Allied Signal fail to describe the grounds of Defendants' objections, let alone *why* they were supposedly without merit. In fact, the attachments to the Complaint reveal that the objections to Allied Signal were hardly frivolous. They prompted the United States Environmental Protection Agency to commence an action against the project for violation of the Clean Air Act (*id.* Exh. 2 at 3), and Allied Signal eventually settled Defendants' objections by making substantial *environmental* concessions. *Id.* Exh. 3 at 93, Exh. 2 at 3, Exh. 1 at 20. Moreover, Allied Signal was not one of the four projects on which Petitioner claimed it lost potential business, and Plaintiff makes no contention that it was injured in any other respect on that project.

claim could be stated. Pet. App. A at 5a.[5]

With respect to the Section 1 claim, the Court of Appeals affirmed dismissal on several independent, alternative grounds. *First*, Plaintiff's allegations of "sham" petitioning alleged only unilateral action by labor union parties and therefore could not support a Section 1 claim for a combination in restraint of trade. Pet. App. A at 4a. *Second*, under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. --, 123 L. Ed. 2d 611 (1993), objectively nonfrivolous petitioning is shielded from antitrust liability "*regardless* of anticompetitive intent or purpose." Pet. App. A at 3a-4a. *Third*, despite the District Court's directions to plead any injury to competition, Plaintiff had failed to do so; "[r]ather, it merely alleges injury to its own business," and "[m]ere injury to [plaintiff's] own position as a competitor is insufficient to state an antitrust claim." *Id.* at 3a. "'[I]t is injury to the market, not to individual firms, that is significant.'" *Id.* (quoting *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1973)).

REASONS FOR DENYING THE PETITION

Petitioner seeks review only of the rejection of its claim under Section 1 of the Sherman Act and the dismissal (on jurisdictional grounds) of its attempt to appeal the District Court's April 30, 1991 order dismissing its extortion and RICO claims.[6] As suggested by the Court of Appeals'

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[5]The Petition raises no issue with respect to the Court of Appeals' disposition of the Section 2 claim. *See* note 6, *infra*.

[6]Petitioner does make reference to Section 2 of the Sherman Act in Question 1. *See* Petition at i. However, the issue addressed in that question—whether the complaint adequately alleged "sham petitioning"—is unrelated to the Ninth Circuit's grounds for rejection of the Section 2 claim, e.g., failure to allege monopoly power in the relevant market. Moreover, Petitioner makes no reference whatever to its Section 2 claim in the body of the Petition.

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issuance of its *per curiam* opinion in unpublished form, in neither respect does this case raise any issue meriting review in this Court.

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[6](...continued)

In any event, the Court of Appeals' disposition of the Section 2 claim was plainly correct and presents no issue meriting review here. An indispensable element of a claim for monopolization is the monopolist's possession of monopoly power in the relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Likewise, as this Court confirmed just last term, a claim for attempted monopolization requires a dangerous probability of monopolization, as shown by the defendant's economic power in the relevant product and geographic market. *Spectrum Sports, Inc. v. McQuillan*,–U.S.–, 122 L. Ed. 2d 247, 259 (1993).

The Second Amended Complaint defined the relevant market as "construction sub-contracts for the installation of piping and insulation . . . ." Pet. App. E ¶35. Respondents are not in the pipe and insulation subcontract market, but rather provide labor to that market, thus operating at a different level of commerce. The Court of Appeals correctly held that, as a matter of law, it is impossible for Respondents, acting unilaterally, to monopolize or attempt to monopolize the subcontracting market since they have no share of that market and, indeed, are unable to supply any subcontracting services. *See Genser v. IBEW, Local 134*, 522 F. Supp. 1153, 1155 (N.D. Ill. 1981) ("It is logically impossible for the Union, acting alone, to monopolize or attempt to monopolize the electrical contracting business. Monopoly power depends on the possession of sufficient control of the relevant market to constitute a monopoly. The relevant market is that area of goods or services in which the defendant competes. The Union's relevant market is labor, not the electrical contracting business; thus the Union could not unilaterally monopolize or attempt to monopolize the electrical contracting market" (citation omitted)).

The District Court acknowledged that a different issue would be presented if the complaint had alleged that Respondents had conspired to file meritless proceedings with market participants having actual or potential monopoly power. Pet. App. B at 29a. It found, however, that the complaint failed to allege any such conspiracy with non-union parties, despite its prior order directing that any supposed co-conspirators and scheme be specified in the pleadings. *Id.* at 29a-30a; Resp. App. A ¶3(a)(ii). The Court of Appeals agreed. Pet. App. A at 5a ("The defendants' alleged activities under Petrochem's § 2 claim are *unilateral*").

I.

THE NINTH CIRCUIT'S REJECTION OF THE SHERMAN ACT SECTION 1 CLAIM WAS CORRECT AND RAISES NO ISSUE MERITING REVIEW.

In this Court, Petitioner defines its Section 1 theory as a "scheme by union groups" to engage in "sham petitioning" in order to "obtain agreements between owners of projects, the union groups and union signatory contractors by which those owners agree to cease doing business (refuse to deal) with non-union contractors . . . ." Petition at i. The rejection of this Section 1 claim by both the District Court and the Court of Appeals was correct and raises no issue meriting further review.

A. The Ninth Circuit Correctly Held That Allegations Of Unilateral Sham Petitioning Do Not State A Valid Claim Under Section 1 Of The Sherman Act.

Petitioner's Section 1 claim rests upon allegations that Respondents engaged in "sham petitioning" activity as a means of furthering their allegedly anticompetitive purposes. But Petitioner fails altogether to address--let alone show error in--the Ninth Circuit's unremarkable holding that allegations of *unilateral* "sham petitioning" do not suffice to state a Section 1 claim.

Both lower courts found that the complaint nowhere alleged that the assertedly sham petitioning activity was undertaken pursuant to an agreement or conspiracy with non-union parties.[7] This conclusion--which Petitioner does

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[7]Of course, to the extent that the complaint alleged that such activities were undertaken pursuant to an agreement between labor union parties, the statutory exemption from the antitrust laws for concerted activity by and between labor union parties would be applicable. *See United States v. Hutcheson*, 312 U.S. 219, 232 (1941). The District Court found that the statutory exemption applied because, despite that court's prior direction to identify any alleged non-labor group conspirators (Resp. App. B

(continued...)

not challenge--is fatal to its Section 1 claim. Section 1 prohibits a "contract, combination . . . or conspiracy, in restraint of trade," not unilateral conduct. 15 U.S.C. §1; *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). 2 E. KINTNER, FEDERAL ANTITRUST LAW, §§9.7, 9.17 (1980) ("Section 1 is directed only at joint action").

B. In Addition, The Complaint Failed To Allege "Sham Petitioning" As Defined In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. – (1993).

The heart of Petitioner's current Section 1 theory is its allegation that Respondents engaged in "sham petitioning" in order to further their assertedly anticompetitive agenda. Such claims are governed by this Court's recent decision in *Professional Real Estate Investors*. In that case, the Court explained a two-part definition of sham petitioning:

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals

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[7](...continued)
¶3(a)(ii)), the complaint "does not mention any participation by or conspiracy with union contractors or subcontractors in the sham petitioning activity." Pet. App. B at 29a; *see also id.* at 30a. The Court of Appeals agreed that the complaint "alleges only unilateral action" and for that reason fails to state a Section 1 claim. Pet. App. A at 4a.

> 'an attempt to interfere *directly* with the business relationships of a competitor' through 'the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.' This two tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." (123 L. Ed. 2d at 623-24 (emphasis in original; citations and footnote omitted))

Because Petitioner's claim failed to satisfy *Professional Real Estate*'s first requirement of showing objectively meritless proceedings, the lower courts properly dismissed it.

In its original ruling dismissing the first of Petitioner's successive complaints, the District Court observed that Plaintiff had failed to provide any factual basis for its vague assertions of sham petitioning and said that in any future pleading Petitioner must provide specific details. ER 85-88, 110 n.2. In dismissing the Second Amended Complaint, the District Court held that Petitioner again "fails to allege that defendants have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless." Pet. App. B at 31a. The Ninth Circuit affirmed on this ground, citing *Professional Real Estate Investors, Inc.* Pet. App. A at 3a-4a.[8]

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[8]In this Court, Petitioner continues to pepper its papers with accusations of "sham" or "meritless" participation that are supported neither by reference to the record nor by the facts. The Petition's repeated assertions that Respondents have "admitted" pursuing meritless objections, or being uninterested in the results of the permit process flagrantly mischaracterize the record. In fact, the complaint and exhibits Petitioner attached show exactly the opposite. The unions become involved in the permitting process only "if there are meritorious objections" that appear after closely examining the environmental, (continued...)

Petitioner vaguely acknowledges that under the first prong of the two-prong test established in *Professional Real Estate Investors*, the defendant's "subjective intentions" are irrelevant. Petition at 21. It could hardly contend otherwise: "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." 123 L. Ed. 2d at 621. Yet, Petitioner does not claim that the courts below overlooked allegations that identified even one instance of petitioning activity that is "sham" within this definition.[9] Instead, it apparently contends that

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[8](...continued)
planning or other issues. Pet. App. E ¶77. Only where there are "serious environmental and economic problems" do the unions participate. *Id.* Exh. 3 at 91. Moreover, where the unions have participated, they have obtained major improvements reducing pollution from numerous projects. E.g., *id.* at 121a, 123a, 125a, 129a.

[9]This case is not the usual case of alleged "sham" litigation, as the complaint alleges no judicial proceedings brought by Respondents. Instead, Petitioner complains generally of public participation by Respondents in open administrative or quasi-legislative proceedings addressing permit applications. As the Ninth Circuit noted in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), in this context the broad parameters for agency decision-making render it difficult for any petitioning activity to qualify as baseless. 542 F.2d at 1079. Permit proceedings are not commenced or caused by opponents of the project, but by the owners' filing of an application for a permit. Environmental review is required by state law, which establishes a public comment period for anyone who chooses to participate. CAL. PUB. RES. CODE §21092(a). Similarly, land use approvals are conducted under the California Planning and Zoning Law and local ordinances, which generally require hearings open to the public on discretionary permit approvals. Many of the hearings are legislative and the approval process for these is essentially a political one. The issue is generally whether a land use restriction bears "real or substantial relation to public health, safety, morals or general welfare." *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 604 (1976) (citation omitted). Under the California Environmental Quality Act (CAL. PUB. RES. CODE §§21000-21178.1), a project that will have adverse environmental impacts may be approved only if the agency finds that the project is justified by "specific economic, social or other considerations."
(continued...)

Respondents' petitioning activity was "sham" because the unions' *goal* was assertedly to secure union-only project agreements that would allegedly violate Section 8(e) of the National Labor Relations Act.

Petitioner's legal theory was definitively rejected by this Court just last term. Respondents' "motive" or "purpose" for engaging in petitioning activity is irrelevant to satisfying the first step in the two-step test established in *Professional Real Estate Investors*: "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." 123 L. Ed. 2d at 624. The "sham" theory which lies at the heart of Petitioner's Section 1 claim is squarely foreclosed by *Professional Real Estate Investors*.[10]

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[9](...continued)
Debate is free-ranging, with business competitors, neighbors, and ordinary citizens expressing their views. "Petitioning" here means submitting comments to public officials or agencies who have solicited comments; it does not mean commencing a lawsuit against an applicant. Especially in this context, nothing in the complaint alleged anything approaching "baselessness." *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) (greater immunity applies to advocating legislative and executive, as opposed to judicial, action).

[10]Because Petitioners' Section 1 claim foundered on the first prong of *Professional Real Estate Investors* (and also because of the failure to allege injury to competition, the issue discussed in the following section), the Ninth Circuit did not find it necessary to address the further issue of whether the complaint adequately alleged a scheme to enter into illegal "hot cargo" agreements. Hot cargo agreements may, under some circumstances, infringe Section 8(e) of the National Labor Relations Act. If they do, that may—in some circumstances (*see Richards v. Nielsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987))—be the basis of a Section 1 claim under *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975).

Petitioner has not briefed these issues and they are not fairly presented by the Petition. Suffice it to say that Petitioner's implication that agreements to use union contractors are broadly proscribed by the antitrust laws is dead wrong. To the contrary, a union-only project

(continued...)

[10](...continued)
agreement does not violate the antitrust laws unless it violates Section 8(e) of the NLRA. *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers*, 793 F.2d 1110, 1115, 1117 (9th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1090 (1987). *Accord, A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853, 856-57 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1985). And although *outside* the construction context hot cargo agreements are generally proscribed by Section 8(e), such agreements are explicitly authorized for the construction industry by the "construction industry proviso" to Section 8(e) when the agreements arise in relation to collective bargaining. 29 U.S.C. §158(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 648 (1982). Congress viewed the validity of such agreements in construction as "necessary to avoid serious damage to the pattern of collective bargaining in *[that] industr[y].*" *Id.* at 656 (quoting S. REP. No. 51, 86th Cong., 1st Sess., 105 CONG. REC. at 17899 (1959) (emphasis in *Woelke*)).

Moreover, the requisite collective bargaining relationship can be established by a "pre-hire" agreement to use union-only labor, as authorized by Section 8(f) of the NLRA. 29 U.S.C. §158(f); *A.L. Adams Constr. Co.*, 733 F.2d at 856-57. "[A]n employer, although largely involved in nonconstruction industries, may take advantage of § 8(f) [and enter into a pre-hire agreement] if it is sufficiently engaged in construction work at one site." 733 F.2d at 857. Or, if a developer has subsidiaries or related entities which employ labor in the construction industry, then union-only project agreements are allowed. *Id.* at 857-58. And a developer that manages its project or acts as its own general contractor may enter pre-hire agreements—even if it does not perform any of the work itself. *Id.* Thus construction unions have the right to seek and obtain union-only project agreements; and by complying with the foregoing principles, unions can ensure the legality of those agreements.

For this reason, the actual identity of the parties to a particular union-only agreement, coupled with its terms, is critical to any determination of its legality or illegality under Section 8(e) and—hence—under the antitrust law. Recognizing this, after rejecting the Section 1 claims in the First Amended Complaint, the District Court issued detailed pleading instructions with which Petitioner was to comply in amending its antitrust claims. Resp. App. B ¶3(a)(i). The District Court found that, despite its instructions as to exactly how any union-only project agreement needed to be alleged, the Second Amended Complaint still failed to allege the parties to or the terms of any agreements alleged to have violated Section 8(e). Pet. App. B at 19a-23a. Because Petitioner failed to provide this critical information, no illegality of any union-only

(continued...)

C. Finally, The Court Of Appeals Correctly Held That Petitioner Had Failed To Allege Injury To Competition.

In the District Court, Petitioner claimed that it did not need to allege facts showing injury to competition because, it contended, it had alleged a *per se* violation of Section 1. *See* Pet. App. B at 23a. On appeal, it abandoned this position, claiming instead that its complaint adequately had alleged the injury to competition required in a rule of reason case. *See* Appellant's Opening Brief at 20-23.[11] The Ninth Circuit disagreed, finding that Petitioner had failed to allege injury to competition. Pet. App. A at 2a-3a.

Petitioner acknowledges, as it must, that in a rule of reason case, the plaintiff must show an injury to competition. *See* Petition at 11 ("Petitioner does not challenge the rule that an injury to competition is usually necessary to state a claim for violation of Section One of the Sherman Act"). This fundamental proposition is well-established. *See, e.g., NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984) ("Under the Sherman Act, the criterion to be used in judging the validity of a restraint on trade is its impact on competition"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 (1984) (in rule of reason case, plaintiff has burden of showing "actual adverse effect on competition"); 7 P. AREEDA, ANTITRUST LAW ¶1502 (1986).

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[10](...continued)
project agreement could be found from the incomplete information provided in Petitioner's pleadings.

[11]Petitioner attempted to revive its *per se* theory in its reply brief. The Ninth Circuit properly refused to consider an issue raised for the first time in a reply brief. *See Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990). Failure adequately and properly to raise an argument in appellate briefs waives those claims and issues. FED. R. APP. P. 28(a)(4); *Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989).

Petitioner's point seems to be that even though at trial it will be required to *prove* an injury to competition, it should not have been required by the District Court and the Court of Appeals to *plead* one. The Ninth Circuit has long required antitrust plaintiffs to allege in their complaints facts showing an injury to competition. *See, e.g., Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 570 (9th Cir. 1988); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988). Other circuits have the same rule. *E.g., Banks v. NCAA*, 977 F.2d 1081, 1087-88, 1094 (7th Cir. 1992) (majority and dissenting opinions), *cert. denied*, 124 L. Ed. 2d 247 (1993); *Garshman v. Universal Resources Holding, Inc.*, 824 F.2d 223, 231 (3d Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 250-51 (2d Cir. 1985); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985); *Quality Foods, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 997 n. 9 (11th Cir. 1983); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979). These cases are fully consistent with this Court's reminder that in antitrust cases, federal trial judges have "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen'l Contractors, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 528 n.17 (1983); *see generally* Brunet & Sweeney, *Integrating Antitrust Procedure and Substance After* Northwest Wholesale Stationers, 72 VA. L. REV. 1015, 1066-74 (1986). As an earlier Ninth Circuit opinion explained:

> "This limitation on the reach of the Sherman Act is reflected in our repeated injunctions that section one claimants must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." (*Les Shockley*, 884 F.2d at 508)

Petitioner identifies no conflict in the circuits on this point, and suggests no reason why the well-established requirement that injury to competition be pleaded should be questioned.

Petitioner stretches the limits of advocacy in contending that this pleading issue involves a question "left open" (Petition at 11) by *Summit Health Ltd. v. Pinhas*, 114 L. Ed. 2d 366 (1991). Nothing in *Pinhas* purported to alter the fundamental element of injury to competition for a Section 1 rule of reason claim. Nor did that case even remotely address pleading requirements for that element. *Pinhas* dealt only with the issue of whether the jurisdictional requirements of the Sherman Act had been satisfied—*i.e.*, whether any cognizable affect on interstate commerce had been established sufficient to invoke federal jurisdiction, a question different from whether injury to competition has occurred to establish liability for an unreasonable restraint of trade. The Court's opinion quotes *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 243 (1980) for the proposition that meeting the jurisdictional requirement may be founded upon "either unlawful purpose or an anticompetitive effect." The Court held that, to invoke federal jurisdiction, the plaintiff was not required to assert an actual effect on interstate commerce because the jurisdictional analysis "focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy was successful." 114 L. Ed. 2d at 375. Moreover, the cases cited in *McLain* dealt with *per se* violations. Thus, nothing in *Pinhas* or the cases which preceded it raises any doubt as to the necessity of pleading injury to competition in a rule of reason case.

In the end, the Petition apparently asks this Court to review the determinations by the Ninth Circuit and the District Court that the particular complaint in this case failed adequately to allege an injury to competition sufficient to pass muster in a rule of reason case. *See* Petition at 11-14. That fact-specific question presents no issue meriting review

in this Court.[12]

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[12]Moreover, that issue was correctly resolved by the District Court (*see* Pet. App. B at 23a-25a) and by the Ninth Circuit. Petitioner's current theory of injury to competition is that the allegedly sham petitioning has resulted in union-only project agreements on four construction jobs, and that this restriction means that four of the nine insulation subcontractors in the relevant market (Northern California) were excluded from these four projects because they are "non-union" shops. But despite its length and prolixity, the Second Amended Complaint (Pet. Ex. E) contained none of the facts from which injury to competition could be determined. For example, it contained (1) no allegation as to the share of the market the four non-union subcontractors had before the allegedly unlawful union-only project agreements were made; (2) no allegation as to what share of the market the four non-union subcontractors had after those project agreements; (3) no allegation as to the market share, either before or after the union-only project agreements, of the union shop subcontractors; (4) no information as to the proportion of potential construction projects in the relevant market covered by the assertedly wrongful union-only project agreements (*compare* Pet. App. E ¶¶37-38 (listing more than 95 projects) *with id.* ¶80 (admitting that many of those projects were *not* constructed pursuant to a union-only contract)); (5) no information as to the total dollar volume of construction projects in the relevant market covered by the allegedly unlawful union-only project agreements; (6) no information as to whether there are any barriers to entry in the relevant market, in the absence of which insulation subcontractors from outside the relevant market could bid on projects; and, most importantly (7) no information as to the impact—if any—of the allegedly wrongful union-only project agreements on prices or output in the relevant market.

Petitioner argues that it was sufficient to allege that four of the nine insulation subcontractors in the relevant market were non-union shops. This, it asserts, amounts to an allegation of "a forty-five percent reduction in the number of subcontractors in the relevant market." Petition at 12. That is completely false. Nowhere did the complaint allege that four (or, for that matter, any) of the insulation subcontractors were driven out of the market. It did not even show that those four subcontractors were excluded from a significant share of the available projects. Indeed, of the complaint's admittedly incomplete list of 95 projects, the complaint identified only a handful for which contractors allegedly could bid only if they would build the project with union labor. *See* Pet. App. E ¶¶52-74; *see also id.* ¶80 (acknowledging that many of the projects were not built pursuant to a union-only project agreement).

(continued...)

II.
PETITIONER'S REQUEST FOR RELIEF FROM ITS FAILURE TO FOLLOW A SETTLED NINTH CIRCUIT REQUIREMENT DOES NOT MERIT REVIEW IN THIS COURT.

In the last section of its Petition, Petitioner seeks relief from this Court for its failure below to follow the well-established Ninth Circuit procedural requirement of replead-

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[12](...continued)

In sum, the complaint does no more than allege that one non-union insulation subcontractor was unable to bid for an unspecified percentage of jobs in the relevant market. But, even assuming that the same would be true of the three other non-union insulation subcontractors there remained at least five different union contractors competing for those insulation jobs and no indication of the existence of any special barriers to entry of even more competitors. There was no allegation, and no reason to presume, that competition would not remain strong and vital in the relevant market. The complaint contained no allegation that having only five available insulation subcontractors, instead of nine, for those jobs restricted to union subcontractors drove prices up, drove output down, or impaired the availability of services. As the District Court correctly determined, even if many more projects were performed by union contractors, this "does not equate with the conclusion that the subcontracting market is any less competitive." Pet. Ex. B at 24a-25a n.8.

On this issue, Petitioner identifies no conflict between the decision of the courts below and decisions of other circuits. It erroneously alleges inconsistency between this case and an earlier decision of the Ninth Circuit, *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988). In *Oltz*, a hospital entered into an exclusivity contract with a group of anesthesiologists, thereby excluding the plaintiff, a nurse anesthetist. While it is true that the court found sufficient injury to competition, it was not—as Petitioner claims—simply because the number of competitors was reduced by one. The result of the exclusivity contract was to create a monopoly service provider (the group of anesthesiologists). Moreover, by a special verdict the jury found that as a result "the *price* of anesthesia services and the *incomes* of the M.D. anesthesiologists rose dramatically . . . ." 861 F.2d at 1448 (emphasis added). That is precisely the kind of impact on the market that constitutes an injury to competition. And it is precisely the type of allegation that Petitioner still failed to make in its Second Amended Complaint—even after the trial court had specifically instructed Petitioners to plead facts constituting injury to competition. Resp. App. B ¶3(c).

ing in an amended complaint, on a protective basis, dismissed claims for which a party wishes to preserve appellate review. In seeking this relief, Petitioner misstates the facts, the applicable law and the procedural requirement itself.

The principle applied by the Court of Appeals relies on the precept that an amended pleading supersedes prior pleadings. It requires that when a motion to dismiss is granted with leave to amend, any of the dismissed claims for which subsequent review may be desired must be repleaded, on a protective basis, in the amended pleading. This principle—which is not claimed by Petitioner to conflict with any federal statute or rule—has the salutary effect of placing in a single amended pleading all claims on which a later appeal may be based. Contrary to Petitioner's characterization (Petition at 26-27), this principle does not preclude review after any amendment. It precludes review only where, as here, the claimant amends without repleading, even on a protective basis,[13] any of the dismissed claims, thereby indicating their abandonment. *E.g.*, *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("a plaintiff waives all causes of action in the original complaint which are not alleged in the amended complaint"); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096, 1098 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971) ("Plaintiffs, in the present case, omitted the common law conspiracy claim from their

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[13]One practice under this principle is simply to include in the amended pleading a verbatim rendering of any of the dismissed claims for which appellate review will eventually be desired, with a short proviso stating that the pleader respectfully acknowledges the prior ruling dismissing the claim(s) and includes them in the amended pleading solely to preserve review. By doing so, the pleader makes clear that it does not seek to relitigate the trial court's prior ruling. *See also* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, §1476 at 559 (2d ed. 1990) (the same may be accomplished by "adopt[ing] some or all of the averments of the original pleading in conformity with the incorporation by reference practice permitted by rule 10(c)" (footnote omitted)).

third amended complaint[; b]y doing so, they waived any right to attack on appeal the District Court's ruling dismissing these claims").

Petitioner gives the impression that this principle stems in the Ninth Circuit from a lone decision involving a pro se litigant. This is not so. This principle has been the law in the Ninth Circuit since shortly after the adoption of the Federal Rules of Civil Procedure in 1938 and has been reaffirmed in the reported case law ever since. *E.g. King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096, 1098 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971); *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Rogers v. Alaska Steamship Co.*, 290 F.2d 116, 124 (9th Cir.), *cert. denied*, 368 U.S. 901 (1961); *Studio Carpenters Local 946 v. Loew's, Inc.*, 182 F.2d 168, 170 (9th Cir.), *cert. denied*, 340 U.S. 828 (1950). Thus, far from being "an example of bad facts making bad law" (Petition at 27 n.8), this principle is a matter of long-settled practice in the Ninth Circuit.[14] Indeed, the Ninth Circuit specifically declined en banc to review this principle in this very case. Pet. App. C.

Petitioner asserts for the first time in this Court that it "tried to restate in shorthand form its original complaint in the first amended complaint." Petition at 28. This assertion is false. Petitioner's first amended complaint contained two antitrust claims and three RICO claims. These RICO claims

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[14]Petitioner cites to cases from certain other courts in which this requirement of repleading was not imposed. It is not surprising that procedural practices differ in their details among the several circuits. Indeed, each circuit and district court is authorized to adopt, and has adopted, local rules of practice consisting of rules like the one at issue here. 28 U.S.C. §2071(a). The local rules adopted by the respective lower federal courts differ significantly among themselves. Variation among the several circuit and district courts in the details of their procedural practices does not require remedial action by this Court. To the contrary, such variation is contemplated and expressly authorized by 28 U.S.C. Section 2071.

were predicated on alleged violations of 29 U.S.C Section 186—a labor law statute regulating payment of union dues—whereas the original complaint contained only RICO claims predicated on asserted violation of state and federal extortion laws through public petitioning. Nothing in the first amended complaint remotely resembled Petitioner's original RICO extortion claims.[15] Petitioner also asserts that the District Judge precluded it from repleading its original claims. Petition at 28. This is incorrect and highly unfair to Judge Lynch. Petitioner never attempted to replead, on a protective basis to preserve review, its original RICO claims in its amended pleadings, nor did it ever seek leave to do so. Had it stated any desire to do so, neither the District Court nor Respondents would have had the slightest objection.

Finally, Petitioner argues, without explanation, that the requirement of repleading dismissed claims to preserve appellate review "invites piecemeal appeals." Petition at 29. This makes no sense. The requirement has no effect on how or when an appeal is taken. It merely regulates how issues are preserved for appeal (as do, for instance, requirements for objections to evidence or jury instructions at trial, or post-trial motions). If anything, the principle discourages

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[15]Petitioner's original RICO allegations asserted that Respondents' petitioning activity was a violation of state and federal extortion laws. Respondents moved in the District Court to dismiss these claims on numerous grounds including: (1) that threats to participate in the political process are protected by the First Amendment and therefore are not criminalized by the racketeering laws (*see I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265 (8th Cir. 1984); *National Organization for Women, Inc. v. Scheidler*, 62 U.S.L.W. 4073, 4077-78 (Jan. 24, 1994) (Souter, J., concurring); (2) that the conduct at issue was in furtherance of legitimate labor objectives and therefore could not have been extortion (*United States v. Enmons*, 410 U.S. 396 (1973); (3) that Congress did not intend, through RICO, to criminalize conduct governed by the NLRA (*United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982); and (4) that the RICO claims were preempted by the NLRA. The District Court granted the motion on the latter ground, without reaching the other issues. Resp. App. A.

piecemeal appeals by prescribing a plain and simple method for identifying and preserving appellate rights on all issues.

In sum, Petitioner misstates law and fact in an effort to gain relief in this Court from Petitioner's own failure to adhere to settled[16] procedural principles. Whether Petitioner's abandonment of its initial legal theory was inadvertence or a conscious decision later regretted, the Ninth Circuit's settled practice presents no occasion for review by this Court.

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[16]In passing, Petitioner characterizes the procedures at issue as "a trap for the unwary," but stops short of asserting that it was unaware of them. Indeed, it was Petitioner, not Respondent, that first brought this issue to the attention of the Court of Appeals in its Opening Brief below.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

DATED: February 17, 1994

Respectfully,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC.,

Plaintiff,

vs.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNSEL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Defendants

No. C-90-3628 EFL

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

I. SUMMARY

This action is brought by Petrochem Insulation, Inc., an open shop subcontractor, against multiple defendants comprised of union organizations, local union chapters, and their attorneys. The complaint asserts that the defendants have conspired to threaten and have threatened to petition at public permit hearings to coerce various developers to enter into agreements to employ union-only labor. Such agreements, termed "hot cargo" agreements, violate section 8(e)

of the National Labor Relations Act, 29 U.S.C. section 158(e).[1] This practice, the complaint asserts, constitutes criminal extortion under California law and the federal Hobbs Act. The criminal extortion, in turn, allegedly constitutes the predicate act for the criminal liability of defendant under the Racketeering Influence and Corrupt Organizations Act (hereinafter "RICO") Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court has proper jurisdiction pursuant to 28 U.S.C. § 1331.

The defendants' motion to dismiss presents several questions, but the Court's disposition of the case requires it to reach but one: whether plaintiff's RICO claims are preempted by the NLRA because the predicate act alleged, criminal extortion, is founded upon a violation of the National Labor Relations Act properly under the jurisdiction of the National Labor Relations Board (NLRB). This Court finds preemption is proper. Accordingly, plaintiff's complaint is dismissed without prejudice.

II. STATEMENT OF THE FACTS

The complaint avers the following: plaintiff is a nonunion insulation prime contractor and sub contractor. One of plaintiff's major markets is the installation of insulation in cogeneration and alternative fuel power plants. The construction of such plants requires numerous permits and licenses from land use and environmental permitting agen-

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[1]Section 8(e) provides, in pertinent part: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

cies. Plaintiff alleges that significant delays in the permitting process can reduce or destroy the economic viability of such construction projects. Since 1988, plaintiff contends that Tom Adams has worked in conjunction with Thomas Hunter and District Council 51 to increase the unions share in the construction market by extorting developers. In particular, plaintiff alleges that the defendants have threatened to petition and to object at permit proceedings, without regard to the merit of their objections, in order to coerce developers into entering into hot cargo agreements.[2] These agreements require a developer to use only construction contractors and subcontractors who have collective bargaining agreements with union organizations. In addition, to coercing a specific developer, one goal of defendants' activities was to make the developer an "object lesson" to other developers, thereby influencing them to hire union labor.

The complaint does not allege that the plaintiff itself was ever extorted or threatened. Rather, the plaintiff opines that, as a non-union subcontractor, it has lost work opportunities, and attendant profits, as a result of "extortionate" tactics of the defendants.[3]

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[2]Plaintiff claims that the defendants threatened to make objections "without regard to merit," but does not provide factual support. Indeed, the plaintiff does not identify the substance of the threatened objections anywhere in the complaint. Because it is not necessary to determine their merit in order to adjudicate the motion to dismiss, the Court shall assume without deciding that the objections were without merit.

[3]The group of defendants named is comprised of union organizations, local union chapters, and their attorneys. Specifically, the complaint avers that defendant District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is an unincorporated labor association whose members are local unions; defendant Thomas J. Hunter is the business manager of District Council 51: defendant United Association of journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO is the union organization

Specifically, the complaint indicates four matters whose repercussions affected the plaintiff. *First*, plaintiff was foreclosed from bidding on a biomass cogeneration project in Woodland, California, because defendant Local 447 induced the project's prime contractor to agree to employ only union contractors by threatening to file environmental objections unless he did so. *Second*, plaintiff alleges that it lost the opportunity to bid upon the five cogeneration plants to be built by GWF Power Systems Company. Although the developer, M.W. Kellog Company, initially requested plaintiff to submit a bid for subcontract work, the energy producer, GWF Powers Systems Company, later informed them that the project was a union-only contract and therefore Petrochem was precluded from bidding unless it employed union labor. Without specifying the causal relationship, plaintiff alleges that this change of heart occurred due to defendants' extortionate threats. *Third*, plaintiff avers that the defendants' "unlawful acts" and "conspiracy" required the General Electric Company to boycott open-shop contractors when awarding contracts for the Burney Cogeneration Plant construction project, thereby preventing plaintiff from receiving a contract. *Fourth*, plaintiff alleges that it failed to obtain a chance to bid for a Chevron project as a result of threats by defendant Adams to file environmental impact objections unless Chevron agreed to use union contractors.

Plaintiff's complaint denominates three causes of action all arising under RICO. The first cause of action is for violation of 18 U.S.C. section 1962(c), which prohibits participation through a pattern of racketeering activity in the

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that chartered District Council Number 51; defendant Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 are all local unions located in either California or Nevada; defendant Thomas R. Adams is a lawyer, associated with defendants Thomas R. Adams, P.C. and defendant Adams & Broadwell, P.C., who has worked with District Council 51.

affairs of an enterprise engaged in interstate commerce.[4] The second cause of action is for violation of 18 U.S.C. section 1962 (a), which makes it unlawful for any person who has received income derived from racketeering activity to use it in an enterprise engaged in interstate commerce.[5] The third cause of action is for a conspiracy to violate the sections cited above, itself a violation of 18 U.S.C. section 1962(d).[6]

All three of plaintiff's causes of action rely upon criminal extortion as the predicate act of racketeering bringing defendant's activity within the proscription of the RICO Act. Plaintiff's theory of extortion is that the defendants' tactics were wrongful because their objective was to gain property, hot cargo agreements, to which they were not rightfully entitled because they violate the NLRA.

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[4]18 U.S.C. section 1962(c) provides, in pertinent part, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[5]18 U.S.C. section 1961(a) provides, in pertinent part, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[6]18 U.S.C. section 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

III. DISCUSSION

A. The Standards For Dismissal under Fed. R. Civ. P. 12(b)(6)

A motion to dismiss for failure to state a claim may only be granted if it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). On a motion to dismiss, a court presumes the facts alleged in the complaint to be true. *Halet v. Wend Invest. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). In addition, a court must draw every reasonable inference from the complaint's allegations in the plaintiff's favor. *Retail Clerks International Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, a court may reasonably infer a fact from the facts properly alleged. *See id.*; *see also Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963). Although a court is bound to give deference to plaintiff's allegations, it is improper for a court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

B. Even Assuming that Defendants' Acts Constitute the RICO Predicate Act of Criminal Extortion, the Claim of Extortion is Wholly Dependant Upon an Unfair Labor Practice and is Therefore Preempted by the NLRA.

1. Overview of the Elements of Criminal Extortion.

To bring its action within the purview of RICO, plaintiff must sufficiently allege the requisite "pattern of racketeering activity." 18 U.S.C. section 1961 lists the acts, known as 'predicate acts' encompassed by the definition of "racketeering activity." one such predicate act, as defined in 18 U.S.C. section 1961, is extortion under state law or extortion or

attempted extortion under the Hobbs Act, 18 U.S.C. § 1951.[7]

"Extortion" is defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." 18 U.S.C. section 1951(b)(2). The definition is substantially the same under California law. The courts have developed a substantial body of case law construing the operation of this definition. In particular, courts have focused upon the interrelation of the "means," here the "use of . . . fear," the "ends," the obtaining of "property," and the over-arching modifier of both, "wrongful."

With respect to the "means," plaintiffs allege that defendants threatened to lodge objections at public permit hearings, without regard to merit, in order to cause the developers concern that the proceedings would be slowed, approval delayed, and as a consequence, their projects' profitability would he diminished. It is well-settled that fear of economic loss, not only fear, of physical harm, is encompassed by the Hobbs Act. *United States v. Cusmano*, 659 F.2d 714, 715 (6th Cir. 1980), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert denied*, 450 U.S. 916 (1981) ; cf. United States v. Gates, 616 F.2d 1103, 1106 (9th Cir. 1980) (inducing payments to avoid county business tax).

With respect to the "ends," courts have broadly construed the property element of extortion under the Hobbs Act as including tangible as well as intangible property rights. The concept of property includes the property right to make

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[7]18 U.S.C. section 1961 provides, in pertinent part, " 'racketeering activity' means . . . any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year; [and] any act which is indictable under . . . title 18, United States code section 1591. . . ."

business decisions free from wrongful coercion. *See e.g. United States v. Zemek*, 634 F.2d at 1174; *see United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); *cf. Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968) (right to lease space in bowling alley free from threats).

Finally, the meaning of "wrongful" under the Act has engendered judicial debate. In *United States v. Enmons*, 410 U.S. 396, 400 (1973), the Supreme Court attempted to provide guidance. The Court observed that on the face of the Hobbs Act, "wrongful" modifies each of the enumerated means of obtaining property, i.e., actual or threatened force, violence or fear. *Id.* at 396. Congressman Hobbs, the sponsor of the legislation, himself indicated that "wrongful" was to modify the entire section. *Id.* at 399, fn. 2. However, the Court reasoned that "wrongful,, must also be read as limiting the statute's coverage to instances where the extortionist's obtaining of property was wrongful because he lacked a lawful claim to it: "The term 'wrongful' . . . would be superfluous if it only served to describe the means used. For it would be redundant to speak of 'wrongful violence' or 'wrongful force' since . . . any violence or force to obtain property is 'wrongful.' Rather, 'wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400.[8]

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[8]The Supreme Court's analysis indicated that "wrongful" does not *only* serve to modify the means, but also to modify the end, the taking of property to which the extortionist has no lawful claim. Certain progeny of *Enmons* have interpreted the case to mean that "extortion" requires the employment of an unlawful means to pursue an unlawful end. *See e.g. Hall American Center Associates Ltd. Partnership v. Dick*, 726

Plaintiff's entire theory of criminal extortion is founded upon the proposition that defendants' threats to petition, which are asserted to have induced economic fear, were "wrongful" solely because the defendants sought thereby to obtain property, hot cargo agreements, to which they were not legally entitled because such agreements violate the NLRA. In its long complaint, plaintiff indicated only generally the property wrongfully obtained, as "tangible and intangible property rights, including the right to make business decisions free from wrongful coercion." However, in its memorandum in opposition to the motion to dismiss, and at hearing, plaintiff indicated more narrowly that the property allegedly extorted was hot cargo agreements. Indeed, its whole theory of extortion rested upon this premise. In its memorandum, plaintiff explained its theory in light of *Enmons'* holding that the obtaining of property is "wrongful" because the alleged extortionate does not have a lawful claim to it: "Because the subject property, the "hot cargo" agreement, is not a lawful claim, *Enmons* cannot provide the defendants with immunization from charges of extortion."[9] At hearing, plaintiff strenuously argued that defendants, threat to petition was "wrongful" only because they sought to trade the right to petition for "illegal" hot cargo agreements. Because plaintiff has represented to the Court that the illegal agreements are the "property" subject to extortion, and indeed rested its whole argument upon that premise, the Court exercises its discretion to view that representation as a judicial admission of fact. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988) (statements of fact contained in a brief may be

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F.Supp. 1083, 1095 (E.D. Mich. 1989); *U.S. v. Traitz*, 871 F.2d 368, 381 (3rd Cir. 1989).

[9]In addition, plaintiff's opposition described the extortionate act as trading environmental objections for an unlawful promise from an owner to cease doing business with other employers, i.e., for a "hot cargo" agreement.

considered admissions of the party in discretion of the district court).

Under plaintiff's theory, in sum, criminal extortion is the predicate act for the RICO cause of action. The claim of criminal extortion, in turn, is wholly dependant for its "wrongfulness" on the notion that its objective was an illegal property, a hot cargo agreement forbidden by the NLRA. in short, defendants' underlying conduct is extortionate and wrongful only by virtue of the labor laws. Because plaintiff's RICO claim is thus based upon an unfair labor practice, it is preempted by the NLRA.

2. Preemption of RICO Claims by the NLRA.

Congress carefully crafted federal labor laws and created agencies to administer them in order to strike a delicate balance between the forces of labor and management. Congress originally gave the National Labor Relations Board exclusive jurisdiction over unfair labor practices as set forth in the National Labor Relations Act. 29 U.S.C. section 160(a). *Butchers' Union, Local No. 498, etc. v. SDC Invest., Inc.*, 631 F. Supp. 1001, 1006 (E.D. Cal. 1986). However, Congress later created exceptions to the NLRB's exclusive jurisdiction, permitting certain unfair labor practices to form the basis of causes of actions in federal court. 29 U.S.C. section 187(b); *Butcher's Union*, 631 F. Supp. at 1006, citing *Constar Inc. v Plumbers Local 447*, 568 F. Supp. 1440 (E.D. Cal. 1983), *aff'd* 748 F.2d 520 (9th Cir. 1984); *also citing International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 241-42 (1952). Therefore, although the general rule known as the preemption doctrine is that NLRB jurisdiction preempts the jurisdiction of federal courts, *Amalgamated Asso. of Street, etc. v. Lockridge*, 403 U.S. 274, 276 (1971), the preemption doctrine does not apply if it is unfair to infer that Congress

intended the NLRB to have exclusive jurisdiction over the matter. *Vaca v. Sipes*, 386 U.S. 171, 179 (1967)

Butchers' Union, Local No. 498 is the leading case on the issue of whether a RICO claim predicated upon violations of the federal labor laws is preempted by the NLRA. In a learned and thoughtful opinion, Chief Judge Karlton addressed the issue of whether Congress, in enacting the RICO statute, intended to create an exception to the NLRB's preemptive jurisdiction over actions arising under the NLRA. There, the plaintiff, a union, brought a RICO action against an employer. The plaintiff alleged three different acts as the requisite predicate acts for RICO liability: *First*, a violation of the Labor Management Relations Act's ban on "sweetheart contracts," under 29 U.S.C. section 186; *Second*, mail fraud under 18 U.S.C. section 1341; and *third*, wire fraud, under 18 U.S.C. section 1343. The first predicate act was one directly proscribed by the labor laws. The latter two, mail and wire fraud, were generic predicate acts not necessarily related to the labor law. However, in the case of *Butcher's Union*, the acts underlying the fraud claims were argued to constitute fraud wholly because the underlying acts were unfair labor practices. In short, the claims of fraud rested wholly upon violations of labor law.

The court first examined the predicate act founded upon "sweetheart" contracts in violation of section 186. It concluded that Congress had expressed its intent to except RICO claims based on section 186 violations from preemption by the NLRA because Congress had specifically included a violation of that labor law statute as a predicate act under RICO. 18 U.S.C. section 1961(l). Moreover, noted the Court, section 186 was the *only* labor law whose violation Congress had specifically enumerated as a predicate act for RICO liability. "[T]he inclusion of section 186 violations as predicate acts suggests that Congress was being

selective as to what activities were being removed from the ambit of the exclusive jurisdiction of the labor law." *Id.* at 1009. Because of its inference that Congress intended to be selective when removing labor law violations from the pre-emptive jurisdiction of the NLRB, the court reasoned that "[t]he violation of no other labor statute constitutes a RICO predicate act." *Id.* at 1009.

In accord with this logic, the *Butchers' Union* court held that where RICO liability is predicated upon violation of a generic, non-labor statute, such as mail fraud, and the violation of that statute is predicated upon an unfair labor practice which otherwise falls within the NLRA, the RICO claims are preempted by the NLRA. The Court acknowledged that there was little legislative history addressing preemption where the acts complained of constituted predicate acts on the grounds that they violated a generic statute, such as mail fraud, and at the same time constituted unfair labor practices subject to the NLRB's exclusive jurisdiction. Lacking the guidance of legislative history or Congressional intent, the Court relied upon the accepted holdings of labor law preemption. *Id.* at 1010, *citing Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 504 (9th Cir. 1985) (accepted principles of labor law preemption should govern where statutory or congressional guidance lacking). The court, relying on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), observed that a claim is generally preempted if it is arguably within the NLRB's jurisdiction. In *Butchers' Union*, the plaintiff relied upon mail fraud and wire fraud as requisite predicate acts for RICO liability. However, plaintiff's complaint alleged that the use of the mails and the wires perpetrated a fraud only because it deprived plaintiff's rights under the labor laws. Because liability for the predicate acts of mail and wire fraud statutes was "wholly dependant on the labor laws," the

court held that RICO claims were preempted by the NLRA. *Id.* at 1011.[10]

Subsequent federal cases have applied the *Butchers' Union* test for preemption. Each has found that if the RICO predicate acts were based on generic statutes, such as mail and wire fraud, and, in turn, the conduct underlying the predicate acts was wrongful only by virtue of the labor laws, the RICO claim was preempted by the NLRA. *Brown v. Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1224-26 (N.D. Ill. 1988) (NLRA preempts RICO claims where conduct underlying generic RICO predicate acts also constitutes an unfair labor practice under NLRA). *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 371 (S.D. Ill. 1990) (where predicate acts of mail fraud, wire fraud and extortion are all based solely upon violation of labor laws, RICO claims are preempted by NLRA). *See also MHC, Inc. v. International Union, United Mine Workers*, 685 F. Supp. 1370, 1374-80 (E.D. Ky. 1988) (RICO claim based on predicate act of mail fraud, involving alleged violation of NLRA, was preempted).

The facts of the instant case bring it within the purview of the *Butchers' Union* analysis and, accordingly, lead to the same result of preemption. The complaint asserts that criminal extortion pursuant to the Hobbs Act and California law constitutes the predicate act for its RICO claim. However, the claim of criminal extortion is wholly dependent upon a violation of the NLRA. Plaintiff's theory is that defendants' use of fear of economic harm was extortionate because they sought to obtain property, an agreement, to which they were not lawfully entitled only because the agreement violated Section 8(e) of the NLRA. In short, defendants' liability

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[10]The Court's reading of *Butcher's Union* makes obvious its view that plaintiff's reading of the case is, in actuality, a radical misreading which vainly attempts to patch together a back-stop argument out of quotations taken out of context.

for criminal extortion is wholly dependent on a violation the labor laws. Accordingly, because the only predicate acts alleged are bottomed upon violations of the labor laws, the RICO claims are preempted by the NLRA. The Court dismisses plaintiff's complaint without prejudice.[11]

IT IS SO ORDERED.

DATED: April 30, 1991.

EUGENE F. LYNCH

EUGENE F. LYNCH
United States District Judge

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[11]Plaintiff has not formally filed a motion for leave to file an amended complaint. However, plaintiff's papers make certain intimations that the complaint ought to be read to assert anti-trust claims. The memorandum in opposition turns for support to the "sham exception" of the Noerr-Pennington doctrine in anti-trust. In a letter to the Court dated April 1, 1991, plaintiff mentions in passing that it alleges "an unlawful conspiracy" to engage in conduct "prohibited by the anti-trust laws." Such is a revelation to one who reads the complaint. It contains no causes of action based upon the anti-trust laws and makes no mention of the anti-trust laws. However, it is possible, on the facts alleged, that plaintiff may be able to allege an anti-trust cause of action and proceed upon that theory even though preemption bars its RICO claims. Accordingly, plaintiff's complaint is dismissed without prejudice. Plaintiff is granted 25 days from the date of this order to move the Court for leave to file an amended complaint for the limited purpose of pleading non-RICO claims. Because plaintiff's RICO claims are barred by preemption, plaintiff should not seek to employ amendment as a collateral attempt to replead them. If plaintiff chooses to amend, it should attach a memorandum of points and authorities *and* a copy of the amended complaint indicating the newly-amended or added sections.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC.,

Plaintiff,

VS.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNSEL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Defendants.

No. C-90-3628 EFL

ORDER DENYING RECONSIDERATION AND DENYING LEAVE TO FILE FIRST AMENDED COMPLAINT

Plaintiff's Motion for Reconsideration of Dismissal of RICO Action Based Upon NLRA Preemption Or For An Appealable Order As To This Cause of Action, and plaintiff's Motion for Leave Of Court To Amend Complaint came on regularly for hearing on July 19, 1991. The Court having considered the moving, opposing and reply papers,

and good cause appearing therefore, it is hereby ORDERED:

1. That plaintiff's Motion For Reconsideration is denied, as are plaintiff's request for certification under Fed. R. Civ. P. 54(b) and plaintiffs request to amend *nunc pro tunc.*

2. That plaintiff's Motion For Leave Of Court To Amend Complaint is hereby denied insofar as it seeks leave to file the proposed "First Amended Complaint" submitted with said motion.

3. Plaintiff is granted leave to file an amended complaint, within 45 days of the July 19, 1991 hearing, to allege claims other than the extortion claim under RICO which was dismissed without leave in the Court's April 30 Order. The proposed Amended Complaint should however, conform with the Court's oral admonitions at the July 19, 1991 hearing, and should state, to the extent possible, for any antitrust claim all of the following facts:

(a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member, and in addition shall conform to the following:

(i) In the event that plaintiff contends any union-only project agreement or other contract is an illegal restraint of trade or part thereof, for each such agreement it shall identify to the extent possible the agreement, each of the parties to it, its terms, and shall attach the agreement, if it is in plaintiff's possession.

(ii) In the event that plaintiff contends that any combination or conspiracy to restrain trade exists apart from any contract, plaintiff shall identify each combination and conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe the unlawful objective.

(b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.

(c) The injury to competition that resulted from each alleged contract.

(d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market.

4. Insofar as the proposed pleadings attempts to allege a RICO violation, plaintiff shall attempt to conform that pleading with the Court's Standing Order re: RICO Actions served by the Court on plaintiff at the hearing on July 19, 1991.

IT IS SO ORDERED.

DATED: July 30, 1991.

EUGENE F. LYNCH
United States District Judge